

## Client Alert: The Impact of COVID-19 on Commercial Leases Force Majeure and Curtailed Court Operations

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The COVID-19 pandemic has impacted the ability of many businesses to satisfy payment and other obligations under leases and other contracts. As tenant income has precipitously dropped over the past few weeks, often as a result of government mandated closures or restrictions on operations, landlords and tenants are taking a hard look at force majeure provisions in leases. First and foremost, clients should be aware that in all jurisdictions, the courts are expected to follow the express provisions in a lease, and this is especially so in the commercial context. A sampling of office and retail leases shows that these provisions nearly always list the types of events that will excuse performance and they often carve-out the payment of rent from the obligations excused. In other words, these provisions may suspend non-monetary obligations for the duration of the triggering event, such as construction, remaining open, operating, and the like but not payment. An illustrative provision states:

If either party shall be delayed or hindered in or prevented from the performance of any non-monetary act required hereunder by reasons of strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws, riots, insurrection, war, Acts of God, fire or other casualty, or other reason of similar or dissimilar nature beyond the reasonable control of the party delayed, then performance shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this Section shall not operate to excuse Tenant from the prompt payment of rent or any other payments required by the terms of this Lease and shall not operate to delay or extend the term of the Lease.

Another provision states, delays or failures to perform resulting from lack of funds shall not be deemed delays beyond the reasonable control of either party. One retail lease force majeure provision excused or suspended all of a tenant's obligations except payment of rent and opening for business on the commencement date. Clients must examine the force majeure provision in their leases to see if it provides for a temporary abatement of rent during the triggering event. Businesses are just starting to file suits to determine whether the force majeure provisions in their leases abate rent. Due to COVID-19, a tenant operating a large high-end shops and parking facility in New Orleans, with monthly rent of \$580,000, filed suit last week seeking to abate rent under its force majeure provision, which provided for abatement of minimum rent in certain circumstances, including for an Act of God beyond the reasonable control of the tenant. The court has not yet issued a ruling.

Some force majeure provisions benefit only one side for instance, another provision expressly applied only to a landlord's inability to perform and suspended only its obligations. Some force majeure provisions might exclude virus outbreaks or other events as triggering occurrences and the courts would be expected to follow the provisions. In addition, two other principles relating to these provisions are: (1) force majeure provisions must actually be included in the lease they must be express and are not implied into the lease by the courts; and (2) a party faces the risk of waiving such provisions if not timely invoked. Parties should give prompt and factual notice to each other if they intend to rely on these provisions.

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This blog does not discuss the separate legal principles of impossibility, commercial impracticability or frustration of purpose, which parties to a lease may argue suspend or cancel obligations due to the pandemic or government-mandated closings. The courts would then be required to determine if these theories are available, or precluded, when an express force majeure provision addressing the circumstances is contained in a lease.

It seems likely that parties to leases will be exploring temporary workouts during this extraordinary circumstance that has affected all aspects of the economy.

In response to the COVID-19 outbreak, the local jurisdictions have issued emergency declarations and orders suspending routine, non-emergency court proceedings, certain deadlines, execution of eviction writs and limiting courthouse functions. These orders are regularly being updated and extended, and currently cover most of April 2020 in the three area jurisdictions.

Jackson & Campbell, P.C. represents many regional commercial real estate development and management firms, as well as businesses that lease space as tenants.

*This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact [Mitchell Weitzman](#) at Jackson & Campbell, P.C.*

**TAGGED:** commercial leasing, Commercial Tenant s Lease, Real Estate News, COVID-19, force majeure